

1700986 (Migration) [2018] AATA 5050 (24 October 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1700986
MEMBER:	Simone Burford
DATE:	24 October 2018
PLACE OF DECISION:	Perth
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) of Schedule 2 to the Regulations • cl.820.221(1) of Schedule 2 to the Regulations • r.2.03A

Statement made on 24 October 2018 at 4:43pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) – Subclass 820 (Partner(Temporary)) visa – genuine relationship – de facto relationship – shared life together – supporting statements from family and friends – support each other through period of hardship – credibility concerns – sponsor’s previous relationship – Schedule 3 criteria waiver – compelling reasons – applicant’s visa history – decision under review remitted with direction

LEGISLATION

Migration Act 1658 (Cth), ss 5CB, 65
Migration Regulations 1994 (Cth), rr 1.09A, 2.03A Schedule 2 cls 820.211, 820.221

CASES

Babicci v MIMIA (2005) 141 FCR 285
He v MIBP [2017] FCAFC 206
MZYPZ v MIAC [2012] FCA 478
Waensila v MIBP [2016] FCAFC 32

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 29 December 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, [Mr A], applied for the visa on 1 August 2016 on the basis of his relationship with his sponsor, [Ms B]. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.221(1) because the delegate was not satisfied that the applicant continued to be the de facto partner of the sponsor as outlined in cl.820.211(2) and defined in s.5CB of the Act.
4. The applicant appeared before the Tribunal on 6 April 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, [Ms B], and from [Mr C], a friend of the parties. [Ms D], the sponsor's mother, was available to give evidence; however, the Tribunal had a statement from her on the file and did not regard it as necessary for her to give oral testimony.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether the applicant is the de facto partner of the sponsor as defined in s.5CB of the Act.

Whether the parties are in a spouse or de facto relationship

7. Clause 820.211(2)(a) and cl.820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

Are the parties in a de facto relationship?

8. As the parties are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act.
9. 'De facto partner' is defined in s.5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).

10. In forming an opinion whether the parties are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) of the Regulations, which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
11. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it including material submitted by the applicant prior to and following the Tribunal hearing.
12. Based on the material contained on the Department's file, the Tribunal acknowledges that it had before it significantly more information regarding the current status of the parties' relationship including, but not limited to, details of their relationship prior to the application being filed and third party oral testimony from family members which supported the parties' account of their relationship.
13. The applicant and the sponsor both gave evidence at the hearing. The Tribunal questioned them at length about their relationship. The Tribunal took evidence regarding the development of their relationship, their relationship history, knowledge of each other's background and family history, financial, social and household aspects of their relationship and the nature of their commitment to each other.
14. The Tribunal found the applicant to be a credible witness and accepts his oral evidence on this basis. The Tribunal had some concerns regarding the credibility of the sponsor based on a previous sponsorship (addressed below). However, keeping this reservation in mind the Tribunal found her evidence with regard to the current relationship to be credible. The Tribunal has considered their oral evidence together with the additional documentary evidence submitted at the review stage in reaching its findings.

15. *Relationship background*

16. The applicant is a national of Zambia born in [year]. He has not been previously married. The applicant's family are predominantly in Zambia; however, he has two sisters living in [another country]. The sponsor is an Australian citizen born in [year]. She was previously in a de facto relationship from mid-2009 to mid-2011. There were no children of this relationship. [Ms B] sponsored her previous partner for a partner visa in 2011. The issue of [Ms B]'s previous relationship and partner visa sponsorship is discussed further below.
17. The parties claim to have met at a party in January 2010 through a mutual friend who was a schoolmate of the applicant from Zambia. Following this, the parties became friends on Facebook. The applicant visited the sponsor at work in August 2011 and invited her out. They started dating in August 2011 and entered into a committed de facto relationship in September 2011 when the sponsor moved in with the applicant at an address in [Suburb 1]. In February 2012 they signed a lease in both names and moved into another home in [Suburb 1] where they stayed for two years, moving to an address in [Suburb 2] following that.
18. In late 2012 the sponsor fell pregnant with the parties' baby. The pregnancy developed complications and the sponsor was admitted to hospital in March 2013. The baby was delivered several weeks later but was not born alive. A birth certificate dated [April] 2013 was provided indicating that the baby was born on [March] 2013 in [location deleted]. The certificate indicates that the baby was not born alive. The certificate lists the sponsor as the

baby's mother and the applicant as the baby's father. Both parents are informants on the birth certificate.

19. The sponsor spent several weeks in hospital at this time and was required to quit her job. The couple purchased a dog in 2013 which they continue to own and care for together.
20. At this time the applicant was studying for a bachelor's degree at [a] University on a student visa. This visa was cancelled in January 2014. The applicant sought a review of that cancellation decision and the application was remitted to the Department on [date] October 2014 by the Migration Review Tribunal.
21. The visa applicant's bridging visa lapsed in late 2014 in circumstances where the visa applicant maintained he was unaware of the lapse and provided with misinformation from the Department. He applied for another student visa on 24 February 2015 and this was refused on 11 March 2015. He sought a review of this decision to the Tribunal.
22. On 18 February 2016 the Tribunal affirmed the decision not to grant the applicant a student visa.¹ However, the Tribunal considered that the case should be referred to the Department to be brought to the Minister's attention. The Tribunal accepted that the applicant was vigilant in this follow-up of the earlier decision to set aside the visa cancellation and that it appeared that it was the Department's advice or internal communication system which led the applicant into the situation where he fell outside the 28 day requirement to make another student visa application. A copy of this decision was provided to the Tribunal by the applicant.
23. The applicant sought ministerial intervention. The Tribunal understands ministerial intervention was declined. The applicant indicated this was because he was in a relationship with an Australian citizen and as such had an alternate visa pathway available to him.
24. The parties applied for a partner visa on 28 October 2016. They became engaged to be married in June 2017.
25. *Issue of prior sponsorship by the sponsor*
26. On her sponsorship form (Form 40SP) supporting the applicant's partner visa application, the sponsor stated:

27. *as of 31 July 2016 it is come to my attention that my previous partner said he was approved for of our spouse visa without my knowledge after we had already broken up. I received a phone call in 2012 from a lady from migration asking if we were still together – I told her no and phone call ended.*

28. *I am unsure of my previous partner was granted a visa as we had broken up in June 2011. I called immigration on the 1/8/16 and 9:30 AM and spoke with [a Department officer]. She was not authorised to give me any information on his current visa situation. I was advised to write a note saying I was unsure if I was if it was granted or not and that they would look into it. I was definitely not in a relationship from June 2011 onwards. And never approved his visa to be granted*

29. The Department's file included information that the sponsor had made a statement on 18 November 2011 attesting to an ongoing relationship with her previous partner, [Mr E] which was submitted in support of [Mr E]'s application for a partner visa, sponsored by [Ms B]. In the parties' application for a partner visa for [Mr A], they claimed her relationship with [Mr E]

¹ [The applicant' previous AAT decision details deleted].

ended on 14 June 2011. This information was put to the applicant by the Department prior to the delegate's decision.

30. The Tribunal put this material to the sponsor at the hearing and discussed her prior relationship with her in detail. This information was also discussed with the applicant.
31. The sponsor submitted that she had been young when she made the statement and had felt pressured by her previous partner into continuing the sponsorship following the relationship breakdown. She said that the previous partner had undertaken to notify the Department that the relationship was no longer ongoing. She indicated that when she realised he had not done so she attempted to take steps to rectify the situation. She regretted the support she provided to her previous partner following the relationship breakdown but testified that the applicant was unaware of that situation. The visa applicant confirmed that he was aware of the prior relationship but unaware that the sponsor had made a statement supporting the prior partner's application for a visa after the sponsor had broken up with the partner. The sponsor offered a copy of text message exchanges with her prior partner in support of her testimony regarding the sequence of events and her attempts to request that the previous partner notify the Department of the change of circumstances.
32. The Tribunal pointed out the seriousness of making a false declaration and the implications for the sponsor's credibility as a witness. The Tribunal pointed out to the applicant and the sponsor that in having previously made a false declaration the sponsor had placed the current application at risk, as she had made it difficult for the Tribunal's to accept her evidence. Both the applicant and the sponsor indicated that they understood the seriousness of the issue and the implications for the sponsor's credibility.
33. It was clear to the Tribunal that the sponsor regretted her earlier actions and was distressed that they may have an adverse impact on the current application. The Tribunal accepted that the visa applicant was unaware of the circumstances of the prior sponsorship and statements made by the sponsor in that context.
34. The Tribunal regards the issue of the making of a false statutory declaration is extremely serious and conveyed this to the sponsor and the visa applicant. The Tribunal made it clear that this issue casts serious doubt on the credibility of the sponsor's testimony. The Tribunal is confident that the parties understood the seriousness of the matter. The Tribunal notes that the sponsor was very young when the earlier statement was made; however, the Tribunal notes that she was not a minor at the time the statement was made and as such the Tribunal regards the sponsor as responsible for that statement.
35. Tribunal has considered the sponsor's responses to the material put to her at the hearing in the context of all the material before it in reaching a decision.
36. In forming an opinion whether the parties are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

37. *Financial aspects*

38. The Tribunal has had regard to the evidence provided relating to the financial aspects of the relationship including joint ownership of assets and joint liabilities, the extent of pooling of financial resources, any legal obligations owed by the other party and any sharing of the day-to-day household expenses.
39. The parties provided financial information which reflects their financial circumstances.

40. The parties testified that initially they were sharing costs 50-50 and the sponsor was transferring rent to the applicant. In 2013 they opened a joint account for the purposes of saving money. However, the applicant has been unable to work since he finished studying in mid-2017. In these circumstances he has been supported by the sponsor. For periods the sponsor has also been unable to work and has been on social security benefits.
41. The parties attested to having a joint account and each having a personal account. They provided copies of their joint bank statements. The joint bank statements evidence regular payments for health insurance, veterinary bills, and car insurance and utility bills.
42. The parties also provided evidence that the sponsor has made the applicant a beneficiary of her estate and her superannuation.
43. The Tribunal is satisfied based on the evidence provided that the parties' financial arrangements would indicate that they have been in a genuine de facto relationship since September 2011.

44. *Nature of the household*

45. The Tribunal has had regard to the evidence as to the nature of the household including the parties' living arrangements and any sharing of housework.
46. The parties have been living together at various addresses since September 2011. Documentary evidence of leases and references from a landlord were provided. The Tribunal is satisfied the parties have been living together since September 2011.
47. The parties do not currently have any children together. The sponsor testified to having had several miscarriages during the relationship, including a son who was stillborn in 2013. Documentary evidence was offered in support of this testimony.
48. The parties adopted a puppy together in 2013. A registration certificate listing the sponsor as the owner and the applicant as the alternate contact for the dog was provided to the Tribunal.
49. The parties testified that they share responsibility for housework and cooking. The sponsor takes primary responsibility for the house work and laundry. The applicant is responsible for cooking, outdoor cleaning and maintaining the dog. Their responses were consistent in this regard.
50. The Tribunal finds on the sworn evidence that the nature of the parties' household would indicate that they have been in a genuine de facto relationship since September 2011.

51. *Social aspects of the relationship*

52. The Tribunal has had regard to the evidence provided as to whether the parties represent themselves to others as being in a genuine de facto relationship, the opinion of the parties' friends and acquaintances about the nature of the relationship and any basis on which the parties plan to undertake joint social activities.
53. The parties have provided supporting material including photographs in group settings and with friends and family and posts from social media evidencing significant events in the relationship. There is third party support for the relationship in the form of statutory declarations and statements from friends and family. [Mr C] testified at the hearing that he has known the couple since they first met in 2010. He has observed the development of their relationship over the years and attended their engagement party last year. He has met

members of both their families. His evidence supported the parties' account of the development of their relationship and he attested to his belief in its genuineness.

54. The parties became engaged in June 2017 and held an engagement celebration in September 2017. A copy of the invitation was provided as well as copies of congratulatory cards from friends and family.
55. The parties testified that the applicant has met and regularly sees the sponsor's family. The sponsor's mother attended the hearing and gave a written statement in support of the parties' account of the relationship. The parties testified that the sponsor's grandparents visited from [another country] in early 2017 and met the applicant.
56. The parties also testified that the applicant's mother visited Australia in September 2017 and met the sponsor and the sponsor's family. The applicant's sisters have also visited Australia one in 2013 and one in 2017. One sister was present for the parties' engagement and provided a written statement to the Tribunal.
57. The parties provided evidence that they have attended significant events together including weddings and engagement parties. The parties provided evidence that they declared their relationship to Centerlink in January 2012. The sponsor has also declared the applicant as her spouse in her tax returns and provided a copy of her 2016-2017 tax return as evidence.
58. Third party statements supporting the relationship were from a variety of sources and provided evidence supportive of the couple's account of the relationship. The parties provided statements from [family and friends]. The Tribunal places weight on these statements.
59. In addition to statements from friends and family, the applicant provided a reference letter from '[a community organisation]'. The letter, signed by the chairperson, [name deleted], notes that the applicant has been a valued member of the organisation since moving to [the state] in 2009 and has actively engaged in community activities. It does not mention the parties' relationship.
60. The evidence portrays a couple who are committed to each other and recognised as being in a de facto relationship by their friends, families and acquaintances. This is consistent with the way the couple presented at the oral hearing. The Tribunal finds based on the supporting documentary evidence that the parties represent themselves socially to be in a de facto relationship and have done so since September 2011.
61. *Nature of the parties' commitment*
62. The Tribunal has had regard to evidence provided in relation to the nature of the parties' commitment to one another including the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other, and whether they see the relationship as long-term.
63. The parties have been in a relationship since August 2011. They got engaged in June 2017 and plan to marry in [a Zambian location] in October 2019.
64. The sponsor testified that the applicant supported her through the death of their first child and a recent miscarriage. They also testified that the sponsor helped the applicant through the loss of a close friend in a car accident in 2012.

65. It was clear to the Tribunal that the parties have supported each other through some difficult periods including through the loss of two babies. They have also supported each other through an extended period of financial difficulty.
66. The parties presented at the hearing as a close and committed couple. This was supported by third party evidence. The Tribunal is in no doubt as to the genuineness of their relationship. They clearly provide companionship and emotional support to one another and view the relationship as long-term. The Tribunal finds on the evidence that the nature of the parties' commitment is such that would suggest that they have been in a genuine de facto relationship since September 2011.
67. *Conclusion on de facto criteria in s.5CB(2)*
68. A number of issues were put to the applicant arising from material on the Departments' file.
69. As noted above the Tribunal conveyed to the parties the seriousness of the sponsor having made prior false statements. However, having regard to the general nature of the allegation and the parties' evidence in response, the Tribunal accepted the parties' evidence with respect to these issues. In particular the Tribunal accepted that the applicant was unaware of the circumstances of the prior sponsorship and the sponsor statements in support of that visa application. In such circumstances, while the Tribunal had more in mind the sponsor's history in determining the weight to give her evidence in the hearing, the Tribunal was satisfied on the visa applicant's evidence that this relationship was genuine.
70. Based on the evidence before it, the Tribunal is satisfied that at the time of the application and at the time of the decision the parties have a mutual commitment to a shared life together to the exclusion of all others. The Tribunal finds the parties are in a genuine and continuing relationship and that they live together or not separately and apart on a permanent basis and have done so since September 2011.
71. The Tribunal is also satisfied the parties are not related by family.
72. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and at the time of this decision.
73. Therefore, the applicant meets cl.820.211(2)(a).

Are the additional criteria for a de facto relationship met?

74. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A of the Regulations. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
75. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
76. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement. The Tribunal has found on the evidence that the

applicant and sponsor have been in a de facto relationship since September 2011. Accordingly, the Tribunal is satisfied that the applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application.

77. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

78. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
79. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

80. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in criterion 3001(2), as set out in the attachment to this decision.
81. The applicant provided to the Tribunal a copy of the delegate's decision record. As the delegate refused the visa on the basis the applicant was not the de facto partner of the sponsor, the delegate did not deal with the applicant's visa history.
82. The applicant provided the Tribunal with a copy of the previous decision of Tribunal made on 18 February 2016. This decision confirmed that the applicant's last substantive visa was his student visa which ceased to be in effect on 15 March 2014. While the applicant successfully sought review of the cancellation of that visa on 15 January 2014, he remained on a bridging visa and for what appeared to be administrative reasons according to the Tribunal, the applicant did not obtain a further substantive visa.
83. Having regard to the information concerning the applicant's visa history, the Tribunal finds that the last day the applicant held a substantive visa was when his second student visa ceased on 15 March 2014. The Tribunal finds that the 'relevant day' was 15 March 2014 within the meaning of criterion 3001(2)(c).
84. The Tribunal finds that the applicant was not a holder of a substantive visa at the time he made the application for a partner visa on 1 August 2016. This was more than 28 days after the 'relevant day'. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.
85. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.

86. *Compelling reasons*

87. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful

to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.

88. As outlined above, there is strong evidence that the applicant was not the holder of a substantive visa at the time the application was made due to circumstances beyond his control. This includes the findings outlined in the earlier Tribunal's consideration of the applicant's student visa application. On that occasion the Tribunal found that the applicant was vigilant in his follow-up of his visa status and that:
89. *it appears that it was only the advice from Department, and/or the failure of internal communication systems, that lead to a situation where he fell outside the 28 day requirement. That is, circumstances completely outside his control.*²
90. The Tribunal considers the applicant's visa history in this regard as a compelling reason for not applying the Schedule 3 criteria.
91. In this regard the Tribunal notes that it has found that the applicant and sponsor have been in a de facto relationship since September 2011. In such circumstances it is likely that the applicant would have met the criteria for the grant of the partner visa if the application had been made when he was on his last substantive visa.
92. Further the Tribunal notes that there is strong evidence that the parties have had a complicated and traumatic history with regard to their attempts to have children and that they are continuing to provide critical emotional support to one another in this regard. The Tribunal notes that the couple's most recent miscarriage was earlier this year and that at the time of the hearing the sponsor was not working while recovering from that miscarriage.
93. Having regard to all the circumstances of the parties the Tribunal finds that there are compelling reasons for not applying the Schedule 3 criteria to the application.
94. Accordingly, the applicant meets cl.820.211(2)(d)(ii).
95. The Tribunal accepts that the applicant was sponsored and therefore meets cl.820.211(2)(c). The applicant continues to meet these requirements of cl.820.211(2) at the time of decision. He therefore meets cl.820.221(1).
96. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

97. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2) of Schedule 2 to the Regulations
 - cl.820.221(1) of Schedule 2 to the Regulations
 - r.2.03A

²[The applicant's previous AAT decision details deleted].

Simone Burford
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For sub 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.